A. Arbitrazh Courts

1. What is an "Arbitrazh Court" and Does it Conduct Arbitration?

There is a common confusion among those not familiar with the Russian legal system about the nature and function of the system of arbitrazh courts and their relationship to other bodies which have the adjective "arbitrazhnyi" or even the term "arbitrazh court" in their titles. This confusion is quite understandable, since the adjective "arbitrazh" and the term "arbitrazh court" are used in Russian to refer to two different kinds of bodies, and English translation often fails to distinguish between them. The "arbitrazh courts" in the Russian Federation are a system of courts which have jurisdiction over most commercial disputes and many other cases involving business entities. These are not arbitration tribunals and they do not conduct arbitration - they are courts in the general sense of the word. They operate according to federal laws concerning their structure and procedures and they are staffed by full-time judges who are paid by the state and appointed through a formal procedure of nomination and approval by federal bodies.

As a general matter, classical arbitration is referred to by the Russian term "treteiskii sud" or "third-party court." However, the confusion of terms and functions is made more difficult by the fact that there are some instances in which the adjective "arbitrazh" is used to refer to arbitration rather than to the arbitrazh courts. In particular, the two oldest arbitration facilities in the Russian Federation — the Maritime Arbitration Commission and the International Commercial Arbitration Court — use the adjective "arbitrazhnyi" in their titles, with the second body using the term "arbitrazh court," although both of these bodies conduct a traditional form of arbitration. In addition, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is rendered in Russian using the term "arbitrazh decisions" rather than the term "treteiskii sud," and there are other instances of the use of the word "arbitrazh" alone, or the term "arbitrazh court," to refer to arbitration tribunals, especially foreign arbitration tribunals

or those resolving international commercial disputes. Because of this dual use of the term "arbitrazh," and the high probability that it will be translated into English as "arbitration" in all contexts, is important to clarify the institution that is actually meant, whether in negotiations and the formulation of contracts, in discussions with legal counsel or in legal literature.

2. State Arbitrazh and the Creation of the Arbitrazh Courts

Arbitrazh courts in their current form have existed in the Russian Federation for less than ten years. Prior to 1991, there existed a system known as "state arbitrazh." State arbitrazh had jurisdiction over the majority of disputes between and among enterprises and other legal entities, as well as disputes between those entities and state bodies. Disputes involving individuals and, in general, disputes not related to planned activities or state supervision of enterprises were handled by the courts. The state arbitrazh system, which grew out of a system of arbitrazh commissions created in the early 1920s, remained in place until 1991, undergoing gradual development from a somewhat dispersed system of dispute resolution bodies with limited formality in procedures toward a more unified system, with increasingly specific and formal rules of procedure and principles for its activities. However, although increasingly formal and "legalistic" in its rules and procedures, the state arbitrazh system remained an administrative body or a quasi-court rather than a court.

The primary function of state arbitrazh was to resolve disputes and difficulties in which a mandatory planning element or a relationship of subordination (as of an enterprise to a state body supervising its activities) was involved. It is important to note, however, that its jurisdiction was not defined in these terms, but rather by the characteristics or legal status of the parties. State arbitrazh had jurisdiction over disputes involving enterprises, institutions and other legal entities and over the disputes of legal entities with state bodies. Disputes involving individuals as even one of the parties were handled by the courts. However, because the spheres of activity of these groups were not permitted to overlap significantly, the division of cases by the characteristics of the parties had the effect of also dividing cases according to type of dispute and applicable law. Individuals were permitted to engage in economic activity for profit only in extremely limited circumstances and their disputes were generally governed by the Civil Code and legislation on consumer protection, labor and social protection. Nearly all activity of enterprises, on the other hand, was governed by legislation on planning and on mandatory forms for enterprise activity, as well as by specific planning orders and regulations. State arbitrazh bodies resolved all commercial and industrial matters on the basis of legal rules applicable to planning and state administration of the economy, while the courts handled cases related to individual matters, which were governed by a different set of legal rules.[1] Consistent with this division of subject matter, foreign trade cases and

[1] Exceptions were made in a few cases in which the division by party status didn't correspond to the broad division of subject matter and applicable law between the two bodies. For example, certain cases concerning very small amounts or unplanned transactions, which were governed by the rules of the Civil Code rather than planning legislation, were assigned to the courts for resolution, even though the parties involved (enterprises) met the status criteria for state arbitrazh.

others in which a foreign firm or entity was involved were within the jurisdiction of the courts despite the identify of the parties as legal entities, since foreign firms were not governed by planning legislation or subordinated to Soviet state bodies.

During the 1980s, a number of pieces of legislation were passed authorizing new, private types of economic activity by individuals, cooperatives and other entities and increasing possibilities for foreign trade and investment. Some of these laws gave jurisdiction over disputes concerning that activity to the courts. This was taken by some to indicate that the traditional division of competence between state arbitrazh (handling planning matters, administrative issues, and mandatory rules) and the courts (handling disputes between equal parties) would be maintained, and that the jurisdiction of state arbitrazh would simply shrink as market-oriented economic reforms moved the Soviet economy toward increasing amounts of unplanned economic activity. In the spring of 1991, however, a law was passed in the RSFSR[2] creating a system of "arbitrazh courts" — a new branch of the court system with a relatively broad jurisdiction.

The new courts were given jurisdiction over domestic disputes concerning "entrepreneurial activity," including those involving legal entities and also individual entrepreneurs.[3] Amendments to the law in 1992 refined the definition to give the arbitrazh courts jurisdiction over disputes "arising from civil-law relationships (economic disputes) or from relations in the sphere of administration," provided that the disputes involved enterprises and organizations that are legal persons or registered individual entrepreneurs. While the element of legal status of the parties, key to defining the jurisdiction of state arbitrazh, was maintained in these definitions, no additional element was added to the jurisdictional definition concerning a planned or mandatory element or relationship of administrative subordination. Thus, the new courts were effectively given jurisdiction over a broad field of disputes arising in the course of commercial activity. This was seen by some as an attempt to create "commercial courts" similar to those existing in some other jurisdictions, and the arbitrazh courts are referred to by some authors and translators as the "commercial courts." The use of party status to define the jurisdiction of the arbitrazh courts, however, and the retention of jurisdiction over disputes involving state bodies, produced a jurisdiction quite a bit broader than that of the commercial courts in many countries. Unlike many commercial courts, the arbitrazh courts do not apply a commercial code or a body of law separate from that which governs similar disputes heard by the courts of general jurisdiction.[4] The jurisdiction of the

[2] The Russian Soviet Federated Socialist Republic - the name of what is now the Russian Federation when a constituent part of the Soviet Union.

[3] Legislation passed in the mid-1980s allowed individuals to engage in economic activity for profit, provided they register as "individual entrepreneurs" with the state. Registration facilitates tax collection and other state supervision of entrepreneurial activity, and penalties are imposed on those who engage in individual entrepreneurial activity without registering as required by law. At present, individuals may also choose to form a legal entity and to pursue business activity through the entity, rather than directly as individuals.

[4] There are some special rules in the Civil Code of the Russian Federation which apply to firms and entrepreneurs and do not apply to citizens involved in the same types of transactions in their private capacity. The number of these is limited, however, and in general the arbitrazh courts and the courts of general jurisdiction are called upon to apply many of the same legislative provisions in resolving disputes.

Russian arbitrazh courts includes not only disputes concerning commercial dealings, but also other types of disputes between the parties and many types of administrative disputes involving the state.

The creation of the new system of arbitrazh courts, based in part on the existing state arbitrazh, made arbitrazh bodies and arbiters subject to the effects of a number of other laws which were designed to protect the independence of courts and to raise the status of judges. It also created some new questions in relation to the earlier pieces of legislation that had assigned dispute resolution concerning new types of economic activities to the "courts" or "through a court procedure." Prior to the creation of the arbitrazh courts in 1991, these were unambiguous references to the courts of general jurisdiction — the only court system then existing. With the creation of a new set of "courts" with jurisdiction over such disputes, the references were no longer so clear. The definition of the jurisdiction of the arbitrazh courts as disputes concerning "civil law relationships" raised questions about disputes and transactions not related to commercial conduct, while the restriction of jurisdiction to registered individual entrepreneurs left questions about investment disputes involving individuals who are not entrepreneurs and other issues related to commerce.

3. Current Structure and Jurisdiction of the Arbitrazh Courts[5]

a) Current Jurisdiction of the Arbitrazh Courts

In 1995, a federal constitutional law "On Arbitrazh Courts in the Russian Federation" was passed, together with a new procedural code for the arbitrazh courts. The new law eliminated the reference to civil-law relationships and illustrated the types of "economic disputes" subject to the jurisdiction of the arbitrazh courts by providing a list of the types of disputes involved. Like the previous law, the new law maintains the status requirements for arbitrazh court jurisdiction — requiring generally that parties be either legal entities or registered individual entrepreneurs. It eliminated, however, the artificial assignment of disputes with any "foreign element" to the courts of general jurisdiction. These disputes are now subject to the jurisdiction of the arbitrazh courts if they meet the general jurisdictional criteria concerning subject matter and status of the parties.

b) Current Structure of the Arbitrazh Courts

Under the 1991 law that created them, the arbitrazh courts were structured as a two tier system, consisting of many arbitrazh courts, each covering a defined territory, and a single superior court — the Higher Arbitrazh Court — for the entire country. ***The Handbook uses the term "Higher Arbitration Court" — a literal translation of the name of the court — to denote the highest court in the arbitration court system. The term "Supreme Arbitration Court" is also commonly used in English, and readers should be aware that the reference is to the same court.*** The various arbitrazh courts

[5] Readers may find some basic information on the arbitrazh court system in English, and a more extensive amount of information, including notes on case decisions, in Russian on the web site for the Russian arbitrazh court system, at www.arbitr.ru.

heard cases in the first instance (the first hearing and decision of the case) and also appeals of first instance decisions. Cassational review — that is, review for legal error only — and also a discretionary "supervisory" review were handled by the Higher Arbitrazh Court. The Higher Arbitrazh Court also had a substantial first instance jurisdiction over serious cases and administrative responsibility for the entire system, as well as the obligation to study the trends in lower court decisions and issue "guiding explanations" to ensure the correct and uniform application of the laws. This structure placed substantial burdens on the Higher Arbitrazh Court's resources.

The 1995 law, under which the arbitrazh court system currently operates, moved much of the Higher Arbitrazh Court's first instance jurisdiction into the lower courts and created an additional tier of arbitrazh courts. The new tier of courts consists of ten "circuit" arbitrazh courts, each of which is assigned a broad territory. The courts serve as a review instance between the lowest arbitrazh courts and the Higher Arbitrazh Court. They are responsible for the cassational review of cases — the review of a case to determine whether significant errors were made in the interpretation or application of the laws by the lower arbitrazh courts.

Under the current structure, the lowest arbitrazh courts hear most cases in the first instance and also consider appeals of first instance decisions. Appeals are directed to the same court that issued the first decision, but must be considered by different judges than those who heard the case originally. When considering an appeal, the lower courts may approach the case *de novo*. In other words, they may recall witnesses and reevaluate the evidence presented in the first hearing of the case, may take new evidence and may reconsider any aspect of the case. The circuit arbitrazh courts hear cassational appeals of the decisions of the lower arbitrazh courts. Because cassational appeals concern only the proper interpretation and application of the law, the circuit courts do not take new evidence.

This restructuring of the system under the 1995 law was intended to free the Higher Arbitrazh Court from a heavy burden of cassational appeals and allow it to accomplish its tasks in the areas of administration of the arbitrazh court system and in review of court practices. On the basis of such reviews, the Higher Arbitrazh Court issues decrees, letters and summaries of practice containing information and guidance for the courts on the proper interpretation and application of the laws. The interpretations and rules of application contained in these documents are binding upon the lower arbitrazh courts.

The Higher Arbitrazh Court also retains its function of hearing cases in "supervisory proceedings." "Supervisory" review of a case is a discretionary review, usually reserved for instances in which a significant error of law has occurred. These cases are heard on the basis of a "protest" concerning an error in the application or interpretation of procedural or substantive law. Protests can be submitted to the Higher Arbitrazh Court only by a very limited number of persons, including the Chair and Deputy Chairs of the Higher Arbitrazh Court and the Procurator General and his deputies. A party may request that a protest be submitted, but the submission of a protest is at the discretion of those who have the authority to do so.

CURRENT STRUCTURE OF THE ARBITRAZH COURT SYSTEM

Higher Arbitrazh Court

Reviews cases on the basis of protests, issues decrees and summaries of practice providing mandatory rules of interpretation and application as guidance for the lower courts, has administrative responsibilities for the system as a whole

Ten Circuit Arbitrazh Courts

Review cases for errors of law, may not accept new evidence or alter evidentiary findings of the lower courts

Arbitrazh Courts

Hear most cases in the first instance, appeals of first instance decisions heard *de novo* by a different bench